STATE OF MICHIGAN

COURT OF APPEALS

BARBIE HEALEY,

Plaintiff-Appellant,

v

CURTIS LEE BRADFORD,

Defendant-Appellee.

UNPUBLISHED
October 26, 1999

No. 212673
Oakland Circuit Court
LC No. 93-460132 DC

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment changing physical custody of the parties' minor child from plaintiff to defendant. We affirm.

The parties lived together, unmarried, from 1990 to 1993, and had one child.[1] On November 25, 1995, following two years of litigation, the parties consented to a custody order that granted the parties joint legal custody but granted plaintiff physical custody of the minor child. Defendant was granted substantial parenting time, as well. On December 30, 1996, defendant filed a petition for change of custody. The trial court, after receiving testimony from many witnesses, granted defendant's petition and awarded physical custody of the child to defendant.

Custody disputes are to be resolved in the best interests of the minor child. MCL 722.25(1); MSA 25.312(5)(1); *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 595; 532 NW2d 205 (1995). The factors the trial court must consider are set forth in MCL 722.23; MSA 25.312(3).[2] According to MCL 722.28; MSA 25.312(8),[3] we must apply a three-part standard of review. We review the trial court's findings regarding each statutory best-interest factor to determine whether they are against the great weight of the evidence. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). We review questions of law regarding custody issues for clear legal error. *Id*. at 876-877. However, the trial court's ruling on which parent is awarded custody is discretionary and will not be reversed absent an abuse of discretion. *Id*. at 880. An abuse of discretion exists where the ruling was "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but

perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

In this case, because the court found that an established custodial environment existed with plaintiff, the court could change custody only if defendant demonstrated by clear and convincing evidence that a change in custody was in the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Heid, supra* at 593. The trial court concluded that clear and convincing evidence was presented that a change in custody was in the best interests of the child. In reaching this conclusion, the court considered all the statutory factors and held that factor "f" (moral fitness of the parties) and factor "g" (mental and physical health of the parties) favored defendant. The court held that the parties were equal with respect to the other factors.

Plaintiff argues that the trial court clearly erred in analyzing factor "d" (length of time the child has lived in stable, satisfactory environment, and desirability of maintaining continuity). The trial court acknowledged that the custodial environment was with plaintiff, but noted that defendant exercised substantial parenting time and that both parents were active in the child's life. Therefore, the court concluded that both parents provided a stable, satisfactory environment and that the child would maintain continuity in seeing both parents. The court held that this factor favored neither party over the other. Contrary to plaintiff's argument, the trial court was not statutorily obligated to explain why the custodial environment should be disrupted. Rather, the court must consider the length of time the child has lived in a stable, satisfactory environment. Just as an "established custodial environment" can exist in more than one home, *Duperon v Duperon*, 175 Mich App 77, 80; 437 NW2d 318 (1989), the trial court may conclude that both parties provide a "stable, satisfactory environment." The trial court did not clearly err in analyzing this factor.

Plaintiff next argues that the trial court's findings regarding factor "f" (moral fitness of the parties) are against the great weight of the evidence. The trial court relied on two incidents of dishonesty on the part of plaintiff—that she misrepresented her residency in order that the child could attend a particular school without tuition and that she failed to disclose her criminal history to her employer. The court concluded that plaintiff "has demonstrated that she will compromise her honesty in order to achieve a particular goal." The court believed that this compromised her moral fitness as a parent and set a poor example for the child.

Under this factor, the court must evaluate the parent-child relationship and the effect that certain conduct will have on that relationship. *Fletcher*, *supra* at 886-887. The question is not which parent is the morally superior adult, and the court must only consider immoral conduct that impacts how the person will function as a parent. *Id*. at 887. Plaintiff argues that, because the child benefited from the misrepresentation regarding plaintiff's residency and because the child did not know about the misrepresentation, it did not set a poor example for the child. We disagree. The trial court concluded that plaintiff's conduct demonstrated a willingness to compromise her honesty in order to achieve desired results. Moreover, our Supreme Court has specifically rejected a "what a child doesn't know won't hurt him" approach to evaluating this factor. *Id*. at 888 n 8. Plaintiff also argues that, because her employer did not ask her about her criminal history, it was not dishonest for her to withhold that information. However, plaintiff testified that hiding the truth is the same as lying, and that she hid the

truth from her employer because she feared that she would not get the job otherwise. Under these circumstances, we conclude that the trial court's findings are not against the great weight of the evidence.

Plaintiff next challenges the trial court's findings regarding factor "g" (mental and physical health of the parties). Plaintiff argues that the court incorrectly focused on whether the child would become a homosexual if he remained in her custody. Although the court discussed the independent psychologist's concerns regarding the child's sexual development, the court noted that such concerns were speculative. The court instead relied on the psychologist's conclusions that plaintiff's negative attitudes and perceptions of men and relationships had a negative effect on the child. This finding is supported by the evidence, given plaintiff's history of poor relationships with men and her admittedly negative attitudes about men and relationships. Moreover, the court's finding that defendant was favored under this factor is supported by the evidence, since the evidence indicated that defendant was a stable person with a healthy relationship with the child. The evidence also indicated that plaintiff was overly encompassing and controlling of the child, which would have a destructive effect on the child's development.

We reject plaintiff's claim that the trial court's findings regarding factor "g" and factor "b" (capacity and disposition of the parties to give the child love, affection, and guidance) are inconsistent. The court found that both parties were equally suited to give love, affection, and guidance to the child. Factor "g," however, relates to the mental and physical health of the parties. These two factors examine different concerns, and the court's findings are not inconsistent. Furthermore, the court did not err in failing to discuss defendant's alleged lack of social involvement with the child. The court need not "comment on every matter in evidence or declare acceptance or rejection of every proposition argued." *Fletcher*, *supra* at 883, quoting *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981). Moreover, evidence was presented that defendant participated in activities with the child, such as hiking, playing baseball, attending hockey games, and building model ships. Therefore, the court's finding that both parties were equal regarding factor "b" is supported by the evidence.

Plaintiff also argues that the trial court should not have relied on the psychologist's evaluation because it was disputed by other witnesses. However, the trial court, as the trier of fact, must decide what weight to give to each witness's testimony. *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998). On review, we give considerable deference to the superior vantage point of the trial court concerning issues of credibility. *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991).

Plaintiff next argues that the trial court erred by not disclosing the child's custody preference on the record. However, a trial court may interview a child privately in chambers and choose to not violate the child's confidence by disclosing his or her choice, as long as the court indicates whether the child's preference was taken into consideration. *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993), aff'd in part, rev'd in part on other grounds 447 Mich 871 (1994); *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988). In this case, there was overwhelming evidence that the child was sad, distraught, and very troubled by the custody dispute between his parents. Therefore, under the circumstances of this case, the trial court's decision not to disclose the child's custody

preference was appropriate. The court did note that the child expressed strong ties with both parents and that the interview was taken into consideration. We find no error.

Plaintiff next argues that, having found that there were acts of domestic violence between the parties, the trial court had a statutory obligation to weigh factor "k" in her favor. Contrary to plaintiff's indication, the trial court did not find that defendant domestically abused plaintiff, only that the parties had physical alterations. Further, there was no evidence that defendant was the sole culprit in the physical altercations. Moreover, the physical altercations occurred before the previous judgment of custody, and the court found that domestic violence was not an issue in either household. Therefore, the trial court's finding that factor "k" favored neither party is not against the great weight of the evidence.

Having reviewed the trial court's findings on the best-interest factors, we conclude that the trial court did not abuse its discretion in finding that defendant met his burden of proving by clear and convincing evidence that a change in physical custody was in the child's best interest. Additionally, we note that, contrary to plaintiff's claim, a finding of equality or near equality on the statutory factors does not prevent a party from satisfying the burden of proof by clear and convincing evidence on a motion to modify custody. *Heid*, *supra* at 596.

Finally, plaintiff claims that the trial court erroneously excluded evidence of defendant's past drug use and domestic violence. However, plaintiff's claims are unpreserved for failing to object or make an offer of proof. MRE 103(a). This Court need not review unpreserved issues, but may do so to prevent manifest injustice. *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). Our review of the record leads us to conclude that no manifest injustice will result from our refusal to review plaintiff's unpreserved evidentiary claims. The trial court expressly noted that the parties had been involved in physical altercations, and defendant did in fact testify regarding his past drug use.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] The child was born on February 17, 1990.

[2] MCL 722.23; MSA 25.312(3) provides as follows:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnesses by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

[3] MCL 722.28; MSA 25.312(8) provides as follows:

To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.